United Nations ECE/MP.PP/C.1/2014/5

Economic and Social Council

Distr.: General
13 January 2014

Original: English

Economic Commission for Europe

Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Forty-fourth meeting
Geneva, 25–28 March 2014
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 24 September 2013

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I. Introduction

1. On 12 March 2012, a member of the public, Ms. Christine Metcalfe on behalf of the Avich and Kilchrenan Community Council, submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the European Union (EU) and the United Kingdom of Great Britain and Northern Ireland had failed to comply with their obligations in relation to the renewable energy programmes and two related projects — for a wind farm and its access route — in the area of Argyll, Scotland.[1]

2. Specifically, the communication relates to the implementation of the renewable energy programme in Scotland and two specific projects in the Avich and Kilchrenan area of Argyll related to that programme, i.e., the Carriag Gheal wind farm and the linked access West Loch Awe Timber Haul Route. The communicant alleges that the authorities at the EU, United Kingdom and Scottish administrative levels failed to provide information to the public, as required by articles 4 and 5 of the Convention, regarding the implementation of the renewable energy programme, which involved also the implementation of a number of individual wind energy projects, such as the farm and the access route. The communication also alleges that due to the lack of transparency, effective public participation was impeded, contrary to articles 6 and 7 of the Convention. Finally, the communication alleges that there are no adequate review procedures for members of the public to challenge the failures of access to information and public participation as required by article 9, paragraphs 1 and 2, of the Convention, while the costs for engaging in such procedures are prohibitively high, contrary to article 9, paragraph 4, of the Convention.

3. The communication also raises concerns with regard to the adoption process of a recent European Commission communication on renewable energy policy (Renewable Energy: a major player in the European Energy market" (COM(2012) 271)) and compliance by the EU with the public participation provisions of the Convention.

4. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Parties concerned on 8 May 2012. On the same date, a letter was sent to the communicant. All were asked to address a number of questions from the Committee.

6. The communicant answered the Committee's questions by letter of 24 September 2012. Both of the Parties concerned responded to the communication on 8 October 2012. The communicant submitted additional information on 24 November 2012.

7. At its thirty-eighth meeting (Geneva, 25–28 September 2012), the Committee agreed to discuss the content of the communication at its thirty-ninth meeting (Geneva, 11–14 December 2012).

8. Additional information was submitted by the communicant on 24 November 2012.

9. The Committee discussed the communication at its thirty-ninth meeting, with the participation of representatives of the communicant and the Parties concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the

[1] Communication ACCC/C/2012/68 and documents related to it, including responses from the communicant and the Parties concerned, are available on the Committee's website from http://www.unece.org/env/pp/compliance/compliancecommittee/68tableeuuk.html.

discussion, the Committee posed a number of questions to both the communicant and the Parties concerned and invited them to respond in writing after the meeting.

10. The communicant submitted its response on 8 February and the Parties concerned on 11 February 2013. Information was also submitted by an observer on 3 March 2013.

11. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee decided to put additional questions to the parties.

12. The Party concerned (United Kingdom) submitted its response on 17 May and the communicant on 18 May 2013. Additional information was submitted by an observer on 13 June 2013, from the communicant on 15 and 23 June 2013 and from the Party concerned on 17 June 2013.

13. The Committee prepared draft findings at its forty-first meeting (Geneva, 25–28 June 2013), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Parties concerned and the communicant on 30 July 2013. All were invited to provide comments by 27 August 2013.

14. The EU and the United Kingdom both provided comments on 27 August 2013, and the United Kingdom provided additional comments on 6 September 2013. The communicant provided comments on 23 August and additional comments on 2 September 2013.

15. At its forty-second meeting (Geneva, 24–27 September 2013), the Committee finalized its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its forty-fourth meeting. It requested the secretariat to send the findings to the Parties concerned and the communicant.

II. Summary of facts, evidence and issues[2]

A. Legal framework

Legal framework of the EU

16. Concerning the legislative framework for the use of renewable energy sources of the EU and its member States, Directive 2009/28/EC on the promotion of the use of energy from renewable sources[3] obliges member States to increase their use of energy from renewable sources and contains a mandatory target of a 20 per cent share of overall energy consumption in the EU to come from renewable sources. EU member States have to develop National Renewable Energy Plans (NREAPs) (see findings on communication ACCC/C/2010/54 (EU) (ECE/MP.PP/C.1/2012/12, paras. 21–23)).

17. Regarding access to information, Directive 2003/4 on public access to information[4] aimed to bring EU legislation in line with the Convention (ibid., paras. 26–27).

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[2] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

[3] Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

[4] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, replacing and repealing Directive 90/313/EC on the freedom of access to information on the environment.

18. With respect to public participation, the EU has in place a regulatory framework relevant for the conduct of, among other things, environmental impact assessment (EIA) and strategic environmental assessment (SEA) in its member States (ibid., paras. 28–32).

19. Finally, Regulation No. 1367/2006 (the Aarhus Regulation)[5] addresses implementation of the Convention vis-à-vis all EU institutions and bodies, and lays down related requirements. The Aarhus Regulation extends the application of Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents to all EU institutions and bodies, requires those institutions and bodies to provide for public participation in the preparation, modification or review of "plans and programmes relating to the environment" and also enables environmental NGOs meeting the criteria it lays down to request an internal review of acts or omissions by EU institutions and bodies.

Legal framework of the United Kingdom

20. The Electricity Act 1989 (England, Wales and Scotland Law) sets out the framework for public electricity supply and the reorganization of the electrical industry. The Act, among other things, regulates licensing and the rights to enter land and carry out construction projects, as necessary for the building or maintenance of the network. With respect to environmental management in general, persons authorized to generate and/or supply electricity must have a regard for the conservation of the flora and fauna and any geological features of special interest present.

21. In Scotland, the construction, extension and operation of power stations over a certain capacity is subject to the consent of the Scottish Ministers (Electricity Act, sect. 36). The Energy Consents and Deployment Unit administers applications on behalf of the Ministers. The process for application to consent includes a consultation phase. An EIA procedure is carried out according to the Guidance On The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 and the Guidance for Electricity Works EIA Regulations 2008.

22. In considering applications under the Act, the Scottish Ministers are called upon to examine a wide range of issues, including any written representations from members of the public, consultation responses, legal and planning obligations and the compliance of the proposal with current Scottish Government policy. Consent is granted after consideration of the potential benefits and shortcomings of the proposed project.

23. The latest revisions to the procedure for consent under section 36, which came into effect after the projects at stake were consented to, aim to further ensure that all relevant stakeholders are able to participate fully in the decision-making process. The Energy Consents and Deployment Unit endeavours to make details of live projects available on its website in order to improve access by members of the public to all details of proposed projects. It encourages members of the public to submit representations electronically.

24. Ownership of the national forest estate in Scotland is held by the Ministers. The Forestry Commission Scotland (FCS)[6] serves as the forestry directorate of the Scottish Government. Activities carried out include maintenance and improvement of the natural

[5] Regulation (EC) No. 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. The Regulation entered into force on 28 September 2006 and became effective on 17 July 2007.

[6] See http://www.forestry.gov.uk/scotland.

environment, the provision of recreation, timber harvesting and replanting of harvested areas.

25. For some types of forestry projects (e.g., afforestation, deforestation, forest roads and forestry quarries) which are likely to have a significant impact on the environment and are above certain thresholds set by law, a formal consent for the work to take place is required by FCS. An EIA procedure is then conducted according to the EIA (Forestry) (Scotland) Regulations 1999 to determine whether consent should be given for the work to go ahead. The FCS Conservancy Office discharges the Scottish Ministers' responsibilities under the Environmental Impact Regulations that apply in forestry projects.

26. The Forest Enterprise Scotland is an executive agency of FCS and operates at arm's length of the FCS. Its internal governance is separate from FCS, including a different Chief Executive and Management Board. The Enterprise is not involved in the evaluation or determination of the EIA report, but rather has the role of a private individual or organization that may bring projects for screening against EIA (forestry) regulations.

B. Facts

27. The communication raises concerns of non-compliance with respect to the processes for the adoption of the renewable energy strategy/policy documentation by the EU and the United Kingdom/Scotland. The communication focuses in particular on the renewable energy programme in Scotland and two projects related to this programme, i.e., the Carriag Gheal wind farm (the wind farm) and the West Loch Awe Timber Haul Route (the access route) which was designed to facilitate access to the wind farm site. The access route is close to a nesting site of Golden Eagles, a protected species. The communicant acts as a Community Councillor in the Avich and Kilchrenan area of Argyll, where the two projects have been undertaken.

The European Commission communication on its renewable energy strategy

28. Early 2012, the European Commission initiated consultations on its renewable energy strategy. The general principles and minimum standards of consultation were laid out in the communication, "Towards a reinforced culture of consultation and dialogue — General principles and minimum standards for consultation of interested parties by the Commission" (COM(2002) 704). On 6 June 2012, the European Commission adopted a communication entitled "Renewable Energy: a major player in the European Energy market" (COM(2012) 271), which presents the final decision of the Commission's renewable energy policy.

Renewable energy strategy in the United Kingdom/Scotland

29. The United Kingdom Renewable Energy Strategy was published by the Government in July 2009. Public consultations were carried out in 2008.[7] At the time of submission of the present communication, Scottish authorities were completing the scoping exercise for a new SEA for the renewable energy programme. As Community Councillor, the communicant is able to have questions raised, via a Member of the Scottish Parliament, in the Scottish Parliament.

30. The NREAP of the United Kingdom, adopted under Directive 2009/28/EC in June 2010, outlines the objectives and implementation mechanism in the renewable action plans

[7] http://webarchive.nationalarchives.gov.uk/20100509134746/http://www.decc.gov.uk/en/content/cms/consultations/cons_res/cons_res.aspx.

in the different parts of the United Kingdom, and the measures that the United Kingdom is taking to meet the renewables targets set by the Directive. The NREAP was based on the Renewable Energy Strategy.

The wind farm and access route projects

31. The applications for the wind farm and the access route were processed separately, and the carrying out of the EIA procedures for each project was also separate. For the access route, the EIA (forestry) (Scotland) Regulations 1999 applied and the competent authority was FCS.

32. The EIA report for the wind farm project referred to reductions in emissions and fuel savings. The Avich and Kilchrenan Community Council found that the information did not refer to properly established figures and that the EIA report overstated what actual savings would occur. It made a submission to the competent authority.

33. During the EIA procedure for the access route, public consultations were conducted. The documentation was available on the FCS website.

34. During the process, the communicant made requests for environmental information to FCS. The requests related in particular to the alternative routes included as part of the EIA documentation, including feasibility studies that had been carried out in 2001, in the context of an unsuccessful FCS bid to the European Regional Development Fund. Most of the documentation regarding the bid had been destroyed; however, some of the documentation was retrieved and shared with the communicant.

35. Nine responses were received, one from the communicant, and no outstanding objections from statutory agencies. The Scottish Natural Heritage, which advised both FCS and Scottish Ministers on matters relating to wildlife and habitats, and the Royal Society for the Protection of Birds did not object to the proposed route.

36. After the EIA reports were adopted there was a six-week deadline for submission of objections, but no objection was received.

Other requests for environmental information

37. Apart from the access to information requests in the context of consultations for the wind farm and the access route, the communicant also made requests for information relating to emissions savings data, which are summarized below.

38. On 24 January 2012, the communicant, as Community Councillor, requested information from the EU Commission with regard to the Good Practice WIND Project (GP WIND),[8] i.e., how the Commission ensured compliance with article 5 of the Aarhus Regulation (annex 1 to the communication). The complaint is currently part of an appeal to the EU Ombudsman.

39. In 2012, in relation to the Electricity Generating Policy Statement[9] and the 2020 Routemap for Renewable Energy in Scotland (Renewable Energy Routemap),[10] the communicant asked the Scottish authorities what measures they had implemented to ensure that the "qualitative assessments", alternative proposals to achieve them and the likely state of the environment without implementation of the plan, were up-to-date, accurate and comparable. The authorities replied on 4 April 2012 that they were not required to generate

[8] See http://www.project-gpwind.eu.

[9] See http://www.scotland.gov.uk/Topics/Business-Industry/Energy/EGPSMain.

[10] Scottish government (Edinburgh, 2011). Available from http://www.scotland.gov.uk/Publications/2011/08/04110353/0.

data where none existed and were obliged only to include the information that might reasonably be required for the SEAs (see annex 7 to the information supplied by the communicant on 24 September 2012).

40. In December 2011, the communicant contacted the United Kingdom Department for Environment, Food and Rural Affairs (DEFRA) about issues of alleged non-compliance with the Convention, especially with article 3, paragraph 1. DEFRA referred the matter to the Department of Energy and Climate Change (annex 2 to the communication). The answer was not to the satisfaction of the communicant.

C. Domestic remedies and admissibility

41. A complaint concerning the matter of this communication was lodged with the European Commission (CHAP(2010)02125) on the basis of a possible violation of the EIA and Habitats Directives.[11] The Commission responded on 29 February 2012 (annex 1 to the communicant's information of 24 September 2012). The reaction was not to the satisfaction of the communicant, who submitted a complaint to the EU Ombudsman. The case was closed on 21 June 2013.

42. The communicant submitted a complaint with the Information Commissioner (annex 3 to the communication), because in her view the SEA for the Electricity Generating Policy Statement and the Renewable Energy Routemap of the Scottish Government was not carried out according to the requirements of EU law (annex 8 to the communicant's information of 24 September 2012). The Commissioner replied that his remit was solely to establish whether the Environmental Information Regulations had been correctly applied.

43. The communicant submitted a complaint to the United Kingdom Ombudsman (annex 2 to the communication) concerning the failure of DEFRA, and subsequently the Department of Energy and Climate Change, to respond to requests for information on emissions savings. The United Kingdom Ombudsman responded that it could not consider complaints about the accuracy of information and referred the matter to the Information Commissioner.

44. The communicant, together with other stakeholders including the European Platform Against Windfarms (EPAW), submitted to the Commission a request for internal review of the communication, "Renewable Energy: a major player in the European Energy market", under article 10, paragraph 1, of the Aarhus Regulation, on a variety of grounds. The request was found to be not admissible on the grounds that the document in question was not an administrative act within the meaning of the Regulation.

45. On 18 March 2013, EPAW filed a complaint with the General Court for the annulment of the communication in question. The Court found the application admissible and the matter is pending.

46. The United Kingdom argues that, with the exception of her complaints to the Information Commissioner, the communicant has not otherwise sought to invoke remedies that would be available to her in the national courts if she was correct in her assertion that the United Kingdom was not in compliance with the Convention.

47. Similarly, the EU is of the view that the communicant has not exhausted all available remedies at the EU level.

[11] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended, and and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

D. Substantive issues

48. According to the communication, the Parties concerned failed to comply with the provisions of the Convention on access to information, public participation and access to justice in implementing the renewable energy programme in Scotland, as well as the related projects for the wind farm and the access route in the locality of the communicant. In the view of the communicant, the lack of public participation in the design of renewable energy policy in support of onshore wind energy generation and the development consent for the Carraig Gheal wind farm and the related access route are only examples of the uncontrolled expansion of wind energy farms in Scotland and throughout the EU space, following the United Kingdom and the EU goals to displace fuel generation, reduce greenhouse gas emissions and reach climate change strategic goals.

49. Both Parties concerned refute the communicant's allegations and comment on the lack of clarity as to the factual basis of the allegations and the precise nature of alleged non-compliance. The United Kingdom argues that the fact that the communicant opposes wind energy in general and the projects in particular does not entail that the United Kingdom failed to comply with the provisions of the Convention. In addition, the EU posits that, given the structure of the EU and its member States, and in particular the observations of the Committee in that respect (see findings on ACCC/C/2006/17 (European Community) (ECE/MP.PP/2008/5/Add.10, para. 44), that the communication rather concerns implementation of the Convention by the United Kingdom than by the EU.

Access to, collection and dissemination of information (arts. 4 and 5, paras. 1 (a) and 2)

50. The communicant's allegations of non-compliance with the provisions of the Convention regarding access to and collection and dissemination of environmental information relate both to the design of the renewable energy policy and the decision-making for the wind farm.

51. The communicant alleges that the Parties concerned failed to ensure that the available environmental information relating to the energy policy (such as the greenhouse gas emission and fossil fuel savings) was transparent, up to date, accurate and comparable. Therefore, the Parties concerned failed to comply with article 5, paragraphs 1 (a) and 2, of the Convention.

52. The communicant also alleges that the EU authorities never replied to her request for information as to whether measures were in place to comply with article 5 of the Aarhus Regulation (concerning the quality of environmental information); and that the Department of Energy and Climate Change had never replied to her request for information, initially submitted to DEFRA, concerning compliance with the Convention. Therefore, the Parties concerned failed to comply with article 4 of the Convention.

53. The communicant further alleges that FCS, by having an ongoing policy of destruction of documents, which may include documents that fall under the Freedom of Information regulation, was not in a position to supply requested information concerning alternative routes to the access route and that therefore the United Kingdom failed to comply with articles 4 and 5 of the Convention. Additionally, the communicant alleges that this failure severely impacted on effective public participation.

54. The Party concerned (United Kingdom) refutes the communicant's allegations. It contends that the Scottish Government and FCS have over the years responded to the substantial quantity of correspondence received from the communicant. The requested information was regularly provided in a manner that was transparent and effectively accessible. The Party had refrained from submitting all this evidence to the Committee, due

to the volume, but affirmed that it was willing to submit it upon request. It argues that the fact that the communicant does not accept that the information she believed should be available was not available is not an indication that the Party concerned (United Kingdom) failed to comply with articles 4 and 5 of the Convention.

55. The Party concerned (United Kingdom) also stresses that the public participation exercises for the policy and the projects demonstrate that the competent authorities in taking the decision were actually in possession of the relevant environmental information.

56. The Party concerned (United Kingdom) also contends that the FCS documents management policy did not prevent the communicant from studying any alternatives. The said policy is in accordance with the Freedom of Information legislation and Environmental Information Regulations. FCS engaged in lengthy correspondence and the relevant files were later found and supplied to her. At the advice of FCS, the communicant could have addressed the matter to the Information Commissioner's Office, but she never did so.

Public participation (Renewable Energy Strategy and NREAP) (arts. 6 and 7)

57. The communicant alleges that the programme at issue (i.e., the Renewable Energy Strategy) is subject to the Convention, as a programme and as a project listed in annex II of the EIA Directive, and is therefore subject to the public participation requirements of article 6 of the Convention. According to the communicant, at no stage in the development of the United Kingdom Renewable Energy Strategy and the NREAP was any effort made by the United Kingdom authorities to inform those living in rural Scotland, who would be the most affected by the Renewable Energy Strategy.

58. The communicant further alleges that the consultation prior to the adoption of the United Kingdom NREAP and the related documentation were not in accordance with the standards set by the Convention, because:

(a) The plan was approved in a "fast track" manner in spite of unresolved environmental issues, thus precluding open and effective public participation at an early stage, when all options were open. For instance, no measures were taken to address the disproportionate impact of the Strategy on rural communities, although the environmental assessments recognized it; the impacts of wind-powered generation associated with landscape, noise and biodiversity were not assessed; and the documents did not mention the possibilities for access to justice;

(b) The authorities failed to take due account of the outcome of public participation, as evidenced by the one-page only document of comments, which ignored a significant number of informed submissions critical of the authorities' assessment of renewable energy potential. According to the communicant, consultation on Scotland's SEA of the Renewable Energy Routemap and Electricity Generation Policy began only in 2012, i.e., after the adoption of the Renewable Energy Strategy and the NREAP. For these reasons, the communicant alleges that the United Kingdom failed to comply with article 7, in conjunction with article 6, paragraphs 4 and 8, of the Convention. According to the communicant, the SEAs for energy in the United Kingdom were initiated only after the NREAP had been adopted and options were no longer available.

59. With respect to article 7, the Party concerned (United Kingdom) contends that in adopting the NREAP it fully complied with the public participation requirements of the Convention. According to the United Kingdom, the NREAP does not set the framework for the determination of consent applications for renewable energy projects and an SEA is not required — unlike the National Policy Statement for renewable energy, for which an SEA is conducted. However, extensive consultations were carried out on the occasion of the following:

(a) The drafting of the NREAP, which used the content and analytical work contained in the Renewable Energy Strategy published by the Government in July 2009. The Strategy was developed following a consultation in June 2008 and impact assessments of proposals for renewable electricity, renewable heat and transport. Responses were received, while conferences and seminars were organized with individuals, businesses and other organizations to discuss the Strategy. A summary of responses was published on the Department for Business, Enterprise and Regulatory Reform's website, which showed that the majority of respondents agreed with the majority of the proposals set out in the consultation;

(b) In Scotland, the Scottish Government set out objectives in respect of renewable energy in its Renewables Action Plan, published in July 2009, and the Scottish Renewable Energy Routemap. Both were subjected to public consultation, including SEA. The latest public consultation on renewable targets (Electricity Generation Policy Statement and an SEA) was organized from March to June 2012. The consultation responses were being processed at the time of consideration of the communication.

60. The EU agrees with the United Kingdom position that the Scottish authorities had conducted extensive consultations on the plans, including SEA under applicable EU law.

61. Concerning the application of article 7 of the Convention to NREAPs, the EU notes that this was already the subject of communication ACCC/C/2010/54, and that the EU is reflecting on possible ways of improving the effective implementation of article 7 by member States when they prepare NREAPs.

Public participation and the European Commission energy communication (art. 7)

62. The communicant alleges that public participation in the context of the renewable energy strategy of the European Commission (COM(2012) 271) also failed to comply with article 7 of the Convention. According to the communicant, it was the outcome of a "professionally organized lobbying campaign", as demonstrated, for example, by the fact that there were 67 submissions from industry and only 28 from NGOs.

63. The Party concerned (EU) states that the Communication on "Renewable Energy: a major player in the European energy market" (COM(2012)271) is not a plan or programme within the purview of article 7 of the Convention, but a political document of a non-legally binding nature, announcing the view of one EU institution as expressed to the other institutions (in particular the Parliament and the Council as co-legislators). The EU, however, notes that because Commission "communications" have the nature of a preparatory step, they could fall under the last sentence of article 7 of the Convention. In this respect, the EU asserts that public consultations were conducted via a widely accessible website for a 12-week period, all in compliance with the Convention.

Clear, transparent and consistent framework (art. 3, para. 1)

64. In September 2012, the communicant also alleged that the EU failed to comply with article 3, paragraph 1, of the Convention, because the Aarhus Regulation and Commission Decision 2008/401/EC[12] do not implement the necessary provisions of the Convention. That the objectives of the Convention are ignored in practice, the communicant alleges, is demonstrated by the current consultations in relation to projects of common interest in energy infrastructure.[13]

[12] Commission Decision of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of the Aarhus Regulation.

[13] See http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm.

Public participation (wind farm and access route) (art. 6)

65. The communicant alleges that the wind farm and the access route are projects that fall under article 6, paragraph 1 (a), in conjunction with paragraph 20 of the annex to the Convention. The communicant, as Community Councillor, participated in the public participation organized in relation to the two projects at issue (the wind farm and the access road) and in her view those were not in accordance with article 6 of the Convention.

66. With respect to article 6 of the Convention, the United Kingdom contends that although the application for the wind farm was made to Scottish Ministers on 24 December 2004, i.e., before the entry into force of the Convention for the Party concerned (United Kingdom), the United Kingdom still complied with the requirements of article 6. Prior to consent, public consultation for the wind farm ran according to the Electricity Act 1989; and for the access route according to the EIA (Forestry) (Scotland) Regulations 1999.

67. According to the United Kingdom, during the public participation for the wind farm, individuals and organizations could make representations (for a timeline of the wind farm application see annex B to the response of the United Kingdom of 8 October 2012). The United Kingdom explains that a total of four consultations ran for the project, one for the original applications and three addenda (7 January–10 February 2005; 1–29 November 2005; 28 February–28 March 2006; and 18 October–23 November 2007). During the consultation proceedings, the Government received 440 representations, including three written objections from Avich and Kilchrenan Community Council (where the communicant is a Councillor) and one from the communicant herself. The Scottish Ministers considered all these objections and during the process they found that the benefits of the project outweighed any potential impacts.

68. With respect to the access route, the United Kingdom contends that an EIA procedure was duly organized, that the communicant was made aware of all project-related documentation available on the website of the authority, and that she could have objected to the EIA report six weeks after it was issued, but she had not done so. During the process, neither the Scottish Natural Heritage, which advised both FCS and Scottish Ministers on matters relating to wildlife and habitats, nor the Royal Society for the Protection of Birds objected. In the view of the Party concerned (United Kingdom) the fact that FCS had a shared project objective with the developer of the wind farm does not in itself result in failure to comply with article 6 of the Convention.

69. The EU stresses that the European Commission, after having made intensive investigations regarding the complaint received by the communicant alleging the failure of the EU to respect public participation requirements in the design and implementation of the route leading to the wind farm, found that there was no infringement of the relevant EU legislation, including the EIA and Birds[14] Directives (annexes to the response of the EU of 8 October 2012).

Access to justice (art. 9, paras. 1 and 2)

70. With regard to access to justice, the communicant alleges that although the Community Council was opposed to the projects, due to the costs involved, it was not possible to pursue judicial review of the project, in breach of article 9, paragraphs 1, 2 and 3, of the Convention.

[14] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (this is the codified version of Directive 79/409/EEC as amended).

71. With respect to article 9 of the Convention, the Party concerned (United Kingdom) notes that, since the Committee is considering the issue of prohibitive costs claimed by the communicant elsewhere, it refrains from commenting on the allegations.

III. Consideration and evaluation by the Committee

72. The EU signed the Aarhus Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005. The EU became a Party to the Convention on 17 May 2005.

73. The United Kingdom ratified the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

74. The Committee first examines the admissibility of the communication and then will focus its consideration on the public participation with respect to the decision-making for the wind farm, the access road, the NREAP (United Kingdom) and relevant documents adopted in Scotland. The Committee will not consider any allegations on access to justice. While the communicant included allegations of non-compliance by the Party concerned (United Kingdom) with the Convention's requirement for non-prohibitively expensive judicial remedies, the communicant did not further elaborate on this matter in its subsequent written and oral submissions.

75. The Committee decides not to consider the allegations with respect to compliance by the EU for the preparation of its renewable energy strategy (COM(2012) 271) because these are currently before the General Court (Case T-168/13, *EPAW v. Commission*) (see para. 45).

76. The Committee also decides not to consider the allegation that the EU fails to comply with article 3, paragraph 1, of the Convention because this submission was made late in the proceedings and was not further substantiated by the communicant.

77. The Committee further decides not to consider whether the EU has in place a regulatory framework to ensure proper implementation of the Convention with respect to NREAPs, given that this was considered in its findings on communication ACCC/C/2010/54 concerning compliance by the EU.

78. The Committee finally decides not to consider the submissions by an observer concerning a different development in Scotland, because this would broaden considerably the subject matter of the communication, the Parties concerned did not have the opportunity to respond to the allegations raised and it appears that complaints have been filed at the domestic level.

Admissibility of the communication

79. The Committee notes that, according to decision I/7, annex, paragraph 13 (a), the Committee's function is, among other things, to consider submissions and communications. Submissions may be brought by one or more Parties about another Party's compliance or by a Party concerning its own compliance (decision I/7, annex, paras. 15 and 16); communications may be brought by members of the public concerning compliance by a Party (decision I/7, annex, para. 18).

80. The present complaint was submitted as a "communication", on behalf of the Avich and Kilchrenan Community Council, a body with statutory duties within the Party concerned (United Kingdom). The Party concerned (United Kingdom) submitted that "it may be helpful to consider the communicant to be Mrs. Metcalfe in person". In this respect,

the Committee considers whether the complaint at issue qualifies as a communication under paragraph 18 of the annex to decision I/7.

81. In order to define the nature of the complaint, the Committee examines the role of community councils in Scotland. Although community councils have statutory duties in terms of licensing and planning, they have no regulatory decision-making functions and are essentially voluntary bodies established within a statutory framework. They mainly act to further the interests of the community and take action in the interest of the community as appears to be expedient and practicable, including representing the view of the community regarding planning applications.[15] In addition, community councils rely on grants from local authorities and voluntary donations. Community Council members furthermore operate on a voluntary basis and do not receive payment for their services.

82. The Committee was also informed by the Party concerned (United Kingdom) that the representations from the Avich and Kilchrenan Community Council with regard to the projects at stake were recorded under the same section as representations from members of the public and non-governmental organizations (NGOs).

83. Based on the above, in particular the role of the council in representing the interests of the community in planning matters and the fact that council members provide their services on a voluntary basis and have no regulatory decision-making functions, the Committee concludes that community councils in Scotland qualify as "the public" within the definition of article 2, paragraph 4, of the Convention. It thus decides to consider the present complaint as a communication under paragraph 18 of the annex to decision I/7, as submitted by Ms. Metcalfe on behalf of the Avich and Kilchrenan Community Council.

Access to, collection and dissemination of information (arts. 4 and 5, paras. 1 (a) and 2)

84. The communicant alleges that the authorities of both Parties concerned did not actively disseminate information regarding quantifiable data on the merits of wind energy projects in general or the information they disseminated was inadequate; nor did they provide this information at the communicant's request. According to the communicant, lack of or inadequate provision of this information impeded effective public participation in the decision-making processes for the adoption of policies, programmes and plans at the EU, United Kingdom and Scottish levels.

85. Based on article 5 of the Convention, Parties have the obligation to possess and update environmental information which is relevant for their functions. This implies that public authorities competent for the development of plans, policies, strategies or projects in relation to wind energy should be in possession of all relevant available information. Empirical calculations of carbon dioxide (CO_2) reductions per policy, plan, programme or project did not seem to be readily available at the time. Instead, calculations were based on modelling and on percentage contributions to renewable energy only. The Committee notes that such calculations are contested.

86. As the Committee has already stated in previous findings (on communication ACCC/C/2010/54, para. 89), "the Committee is not in a position to ascertain whether the technical information disseminated by the Party concerned, or the communicant for that matter, is correct". In the present case, the communicant seems to advocate a method for the calculation of the merits of wind energy that is different from what the decision-making

[15] See letter of the Party concerned of 20 December 2012 and also the websites http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/CommunityCouncils and http://www.highland.gov.uk/livinghere/communitiesandorganisations/communitycouncils.

bodies accept. The Committee has neither the mandate nor the capacity to assess the environmental information in question as to its accuracy or adequacy.

87. Based on the above, the Committee is not in a position to conclude that the Parties concerned failed to comply with the provisions of articles 4 and 5 of the Convention.

88. The Committee, however, notes that different methods are currently available for calculating the CO_2 reductions generated by wind energy projects and that the outcomes of these methods vary considerably. The Committee considers that, based on article 5, paragraph 1 (a), of the Convention, each Party is to ensure that "public authorities possess and update environmental information which is relevant to their functions". For public authorities engaged in decision-making regarding wind energy, this includes data arising from the application of different methods for calculating the CO_2 reductions generated by wind energy projects, including data from actual measurements. The Committee in this respect also notes that a carbon calculator has recently been installed for the wind farm, as was agreed by the parties during the discussion at the Committee's thirty-ninth meeting.

Public participation in relation to the wind farm (art. 6)

89. The Committee notes that the decision-making for the wind farm was initiated in November 2004, that is, before the entry into force of the Convention for the Party concerned (United Kingdom). As pointed out by the Committee in its previous findings, in determining whether or not to consider certain domestic procedures initiated before the entry into force of the Convention for the Party concerned, it examines whether significant events of those processes had taken place since the Convention's entry into force (cf. findings on ACCC/C/2008/27 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.2, para. 34), and ACCC/C/2008/26 (Austria) (ECE/MP.PP/C.1/2009/6/Add.1, para. 49). In the present case, consultations ran in four phases, one for the original applications before the entry into force of the Convention and three for the addenda shortly after the entry into force of the Convention for the Party concerned (United Kingdom). The decision for the project was granted on 13 June 2008 (Scottish Ministers consent)[16] and therefore important events, including consultations, took place after the entry into force of the Convention for the Party concerned (United Kingdom).

90. The wind farm is a project under article 6, paragraph 1 (a), in conjunction with paragraph 20 of the annex to the Convention. The communicant's allegations relate to article 6, paragraphs 6 and 8, of the Convention.

91. With respect to article 6, paragraph 6, of the Convention the communicant submitted that no or inadequate information was provided with regard to the figures for the calculation of the reduction of CO_2 emissions from wind energy and that therefore effective public participation was impeded. The matter of technical data deriving from different methods for the calculation of the reduction of CO_2 emissions from wind energy projects was discussed in paragraphs 84 to 88 above. In line with what was concluded above, the Committee cannot conclude that the Party concerned (United Kingdom) failed to comply with article 6, paragraph 6, of the Convention.

92. On 8 and 11 February 2013, respectively, the communicant and the Party concerned (United Kingdom) provided detailed information on the comments submitted during the consultation for the wind farm project and how those were or were not taken into account.

[16] See http://www.scotland.gov.uk/Topics/Business-Industry/Energy/Infrastructure/Energy-Consents/Applications-Database/Carraig-Gheal-Index/Carraig-Gheal-Consent.

93. In this regard, the Committee confirms that the requirement of article 6, paragraph 8, of the Convention that public authorities take due account of the outcome of public participation does not amount to a right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always required. Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account (see findings on communication ACCC/C/2008/24 (Spain) (ECE/MP.PP/C.1/2009/8/Add.1, para. 98), and ECE/MP.PP/C.1/2009/4, para. 29).

94. Having considered the information submitted by the parties in this regard, the Committee finds that the Party concerned (United Kingdom) overall duly took into account the comments submitted by the communicant and did not fail to comply with article 6, paragraph 8, of the Convention.

Public participation in relation to the access road (art. 6)

95. The access road is a project under article 6, paragraph 1 (a), of the Convention, in conjunction with paragraph 20 of the annex to the Convention. As with respect to the wind farm, the decision-making process started in 2004, before the entry into force of the Convention for the United Kingdom. However, a number of significant events related to the issuing of the permit took place after the entry into force of the Convention. The communicant alleges that the Party concerned (United Kingdom) failed to comply with all the obligations arising from article 6 of the Convention.

96. On 17 and 18 May 2013, respectively, the Party concerned (United Kingdom) and the communicant submitted detailed information on the public consultation process.

97. The assessment of whether a Party concerned is in compliance with article 6 of the Convention depends on whether the steps taken to ensure public participation are commensurate with the size and possible environmental impact of the project. If, for instance, the project concerns the construction of a nuclear power plant, then there is clearly an obligation for the public notice to be advertised widely in national and local media. However, if a project is of local significance, such as the opening of a forest road, a public notice in local media may suffice for informing the public concerned (see also findings on communication ACCC/C/2006/16 (Lithuania) (ECE/MP.PP/C.1/2008/5/Add.6), para. 67).

98. In this case, the Committee finds that the public concerned, including the communicant, had ample opportunity in more than one instance to participate in the consultation process and to submit comments. In this respect the Committee notes the following aspects. First, the way the notice for the project was advertised in the local press fits the local significance of the project and meets the requirements of article 6, paragraph 2, of the Convention. Second, the time frames provided for public consultations (almost one month each time for the original and revised versions of the environmental statement) were reasonable and therefore in line with article 6, paragraph 3, of the Convention. Third, the public concerned was involved from the beginning of the process. The process was therefore in conformity with article 6, paragraph 4, of the Convention. Fourth, the comments submitted by the public were addressed, in particular the main point of concern regarding the protection of the Golden Eagle, entailing that the Party complied with the requirements of article 6, paragraph 6, of the Convention.

99. Based on the above, the Committee does not find the Party concerned (United Kingdom) failed to comply with the public participation provisions of article 6 of the Convention.

Public participation regarding plans and programmes — the United Kingdom NREAP (art. 7)

100. NREAPs are plans or programmes under article 7 of the Convention (see findings on communication ACCC/C/2010/54, para. 75) and as such are subject to public participation. The fact that the United Kingdom's Renewable Energy Strategy, which informed the NREAP, was subject to public participation does not affect this conclusion, given their different legal status and functions in the EU and United Kingdom legal framework, respectively.

101. The Committee concludes that because the United Kingdom's NREAP was not subjected to public participation, the Party concerned (United Kingdom) failed to comply with article 7 of the Convention, in this regard.

Public participation in the preparation of plans, programmes and policies in Scotland (art. 7)

102. The communicant alleges non-compliance with article 7 of the Convention with respect to renewable energy policy documents in Scotland, in particular in relation to the Scottish Renewables Action Plan, the Scottish Renewable Energy Routemap and the Electricity Generation Policy Statement. However, at the hearing the communicant agreed that these documents had been subject to public participation and no longer challenged the compliance of these procedures with the Convention.

103. The Committee notes that the 2009 Scottish Renewables Action Plan was subject to public consultation in the context of the conduct of SEA.[17] Likewise the Renewable Energy Routemap, published in 2011, and the draft Electricity Generation Policy Statement, published in 2010, were subject to SEA in March 2012, in the context of which public participation took place.[18]

104. Given the facts noted in paragraph 103 above and the position of the communicant at the hearing (see para. 102, the Committee concludes that the Party concerned (EU) did not fail to comply with article 7 of the Convention, in this respect.

IV. Conclusions and recommendations

105. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

106. The Committee finds that because the United Kingdom's NREAP was not subjected to public participation, the Party concerned (United Kingdom) failed to comply with article 7 of the Convention.

107. In view of its decision in paragraph 77, the Committee points the Party concerned (EU) to its findings and recommendations in communication ACCC/C/2010/54 (EU).

[17] See http://www.scotland.gov.uk/Topics/Business-Industry/Energy/Energy-sources/19185/Resources/20801/RAPCONS.

[18] See http://www.scotland.gov.uk/Publications/2012/03/2294/2.

B. Recommendations

108. The Committee, pursuant to paragraph 35 of the annex to decision 1/7 of the Meeting of the Parties, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Party concerned (United Kingdom) to in future submit plans and programmes similar in nature to NREAPs to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention.